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Conceiving international law's normative order beyond the 'residual negative principle'

Graham Melling[±]

Abstract

Due to the nature of the international legal system the ICJ is regularly presented with new questions about which international law is unclear or to which it does not yet extend – and is thereby incomplete. The approach of the ICJ when faced with such gaps raises some fundamental questions about the nature of the international legal system and the judicial function of the ICJ. The purpose of this article is to revisit and critically evaluate the issue of how the ICJ responds when faced with a gap or lacuna in the law.

Keywords: Gap, Lacuna, Complete, Incomplete, Neutral, Open, Closed

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Introduction

In the 2010 *Kosovo* Advisory Opinion the ICJ was faced with a question to which it considered international law gave no answer.¹ The Court was requested by the General Assembly to provide an answer to the question: ‘Is the unilateral declaration of independence by the Provisional Institutions of Self-Government in Kosovo in accordance with international law?’² The Court concluded that “the inconclusiveness of state practice ... lead to the conclusion that ‘general international law contains no prohibition of declarations of independence’” and thereby the declaration was not unlawful.³ In its reasoning the Court implied that in the absence of a rule of international law prohibiting the conduct in question, there exists what Julius Stone called a ‘residual negative principle’ that whatever is not prohibited in law is permitted.⁴ Put another way, the Court was unable to identify an applicable rule of law that prohibited the conduct – an absence of law;⁵ otherwise referred to here as ‘a gap’ in the law - the Court thereby resorted to a ‘residual negative principle’ to fill the gap – equating a lack of prohibition with permission.

¹ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010 [hereinafter *Kosovo*]. Available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=4>

² General Assembly resolution A/Res/63/3, 8 October 2008; Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2008/692, 24 November 2008, at para 3

³ See *Kosovo*, *supra* note 1, at Para. 79, 114 and 121; The Court also examined whether the declaration of independence violated Security Council Resolution 1244 or the Constitutional Framework created through it. The Court concluded that the declaration did not violate either of these instruments.; See also ‘Recent International Advisory Opinion’ 124 *Harvard Law Review* (2010-2011) p. 1100

⁴ J. Stone, ‘Non Liqueur and the Function of Law in the International Community’, 35 *British Yearbook of International Law* (1959) p. 136

⁵ I. Tammelo, ‘On the Logical Openness of Legal Orders: A Modal Analysis of Law with Special Reference to the Logical Status of *Non Liqueur* in International Law’, 8(2) *American Society of Comparative Law* (1959) p. 191

In his separate declaration to the *Kosovo* Advisory Opinion Judge Bruno Simma was very critical of the ICJ's resort to such an analysis describing it as "an old tired view of international law"⁶ and being "redolent of nineteenth-century positivism, with its excessively deferential approach to State consent."⁷ According to Simma, adopting the approach it did the Court denied to itself the opportunity to move away from the binary approach to the analysis of international law and to analyse "the great shades of nuance that permeate" it.⁸ In particular, Simma argued, this could include that the law may be 'neutral' or 'silent' on the matter.

In suggesting the potential of international law being neutral, Judge Simma was representing a vision of an international legal system that is 'open', 'incomplete' and with 'gaps'. Clearly Judge Simma was at odds with the approach of the majority reasoning in the *Kosovo* Advisory Opinion, which asserted a conception of the international legal system that is 'closed', in which no gaps in the law exist; in so far as where there is no identifiable rule prohibiting conduct then that conduct is permitted, therefore there is always a rule of law regulating the conduct; meaning the system is closed as an *a priori* condition.

However, such a view of international law as 'closed' as an *a priori* condition does not accurately reflect the fact that courts and tribunals in both domestic legal systems and in the international legal system are constantly being presented with new situations in respect of which the law is unclear or to which it does not yet extend; thereby international law has gaps in a material sense.⁹ The interesting question posed by Judge Simma's separate declaration is

⁶ See *Kosovo supra* note 1, Separate Declaration Judge Simma, para. 2.

⁷ *Ibid.* para. 8.

⁸ *Ibid.*

⁹ See for example Ronald Dworkin who said of law: 'Law by convention is never complete, because new issues constantly arise that have never been settled one way or the other by whatever institutions have conventional authority to decide them.' R. Dworkin, *Law's Empire* (1998) p. 115

that where such gaps in international law exist, how should a court or tribunal respond? In the *Kosovo* Advisory Opinion the ICJ responded by applying the ‘residual negative principle’ it did, thereby presenting the international system as a ‘closed’ normative order. That is one approach, but one about which Judge Simma was particularly critical. An alternative approach is to see the international legal system not as ‘closed’ normative order but rather as being a ‘complete’ system of law. Seeing the international legal system as ‘complete’ rather than ‘closed’ involves the acceptance that there are material gaps in international law but these material gaps can be closed by the use of recognisable and accepted legal devices and reasoning, thereby making it ‘complete’ *ex post facto*.¹⁰ In Judge Simma’s judgment, however, there was, apparently, a ‘third way’ in which a court or tribunal can approach the matter of a gap in international law by concluding can conclude that international law is ‘neutral’ or ‘silent’ with respect to certain acts and therefore the international legal system is incomplete in substance.

The purpose of this article is two-fold. The first part is to critically evaluate the idea of the ‘closed’ nature of the international legal system on the one hand and the idea of the ‘completeness’ of the international legal system on the other hand. The second part is to examine Judge Simma’s view of ‘the possibility that international law can be neutral... on the international lawfulness of certain acts.’¹¹ There are three sections to this analysis. Section two will provide a critique of the ICJ’s approach of asserting the closed nature of the international legal system by means of applying a ‘residual negative principle’ – this approach is oft associated with the reasoning of the PCIJ in the *Lotus* case and more recently was similarly

¹⁰ See P. Weil, “The Court Cannot Conclude Definitively...” *Non Liquet Revisited*, 36 *Columbia Journal of Transnational Law* (1997) p. 110

¹¹ See *Kosovo supra* note 1, Separate Declaration Judge Simma, para. 3; this article will not be examining the doctrine of *non-liquet*.

employed by the ICJ in the *Kosovo* Advisory Opinion. Section three will counter-pose this first approach against the view that international law has gaps; therefore is *de facto* incomplete in a material sense, but the international legal system has developed mechanisms for dealing with gaps in the law to close any gap, thereby making the international legal system ‘complete’. Section four will examine an aspect of Judge Simma’s ‘third way’; that is the possibility that international law can be neutral on a matter with a view to trying to understand how one conceive of international law’s neutrality.

II. Conceiving of international law as a closed normative order as an *a priori* condition

There is a view of the international legal system that it is a logically and formally closed normative order, ‘in the sense that for every legal question which can be asked... there is a determinative answer according to a norm’¹² According to Kelsen for example:¹³

“Existing international law can always be applied to a concrete case, that is to say the question whether a state (or another subject of international law) is or is not obliged to behave in a certain way. If there is no norm of conventional or customary law imposing upon the state (or another subject of international law) the obligation to behave in a certain way, the subject is under international law free to behave as it pleases; and by a decision to this effect existing international law is applied to the case.”

¹² I. Tammelo *supra* note 5, p. 188

¹³ H. Kelsen, *Principles of International Law*, 2nd ed. (Revised & edited by Robert W. Tucker 1966) p. 439.

What this means is that where there is no specific rule of law to provide an answer to the question before the court, the application of the residual negative principle,¹⁴ ‘Whatever is not legally prohibited is permitted’,¹⁵ will in effect, always provide an answer.¹⁶

In practical terms, this view of the formal completeness of international law is synonymous with the reasoning of the Permanent Court of International Justice in the case of the *SS Lotus*.¹⁷ Moreover, in its 2010 *Kosovo* Advisory Opinion the ICJ also asserted the formal completeness of international law by the utilisation of a ‘residual negative principle’.¹⁸ However, these two cases do not stand alone as examples of the Court’s adopting an approach that asserts the *formal* completeness of international law in its reasoning. In the *Nicaragua* case, for example, in rejecting the United States arguments with respect to the lawfulness of its countermeasures against Nicaragua for its stockpiling of armaments, the ICJ’s reasoning, is emblematic of the view of the formal completeness of the international legal system.¹⁹ According to the Court “in international law *there are no rules, other than such rules as may be accepted by the States*

¹⁴ Stone, *supra* note 4, p. 136

¹⁵ I. Tammelo *supra* note 5, p. 188

¹⁶ *Ibid.*

¹⁷ *S.S. Lotus (Fr. v. Turk.)*, 1927, P.C.I.J., Series A, No. 10 (Sept. 7) p. 18 [hereinafter *Lotus*]; The facts of the *Lotus* case are well known and it is not proposed to go over them here. However the reasoning the Court adopted in arriving at its decision is pertinent to this discussion. The Permanent Court of International Justice stated its now (in)famous dicta: “The rules of law binding upon states ... emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law ... Restrictions upon the independence of States cannot therefore be presumed.” [p. 18] According to the Court, international law leaves to States “a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable.” [p. 19].; See H. Handeyside, ‘The *Lotus* Principle in I.C.J. Jurisprudence: Was the Ship Ever Afloat?’, 29 *Michigan Journal of International Law* (2007) p. 80. According to Handeyside ‘...[I]n the face of incompleteness or ambiguity in international law, the *Lotus* principle should mean that international law is complete.’

¹⁸ The ICJ’s approach was subject to strident criticism by Judge Bruno Simma in his Separate Declaration, *Kosovo*, *supra* note 1, Separate Declaration Judge Simma, Para. 8 et seq.

¹⁹ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, (June 27) 1986 I.C.J. 14, para. 269 [Hereinafter *Nicaragua*]; See also Handeyside, *supra* note 17, at p. 81; Weil, *supra* note 10, p. 114.

concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all states without exception.”²⁰ [Emphasis added] The United States had argued that Nicaragua’s stockpiling of weapons justified the United States taking countermeasures. However, the Court rejected this claim on the basis that there was no international law governing how much weaponry a state could stockpile, therefore a state was free to stockpile weapons to the level it chooses. According to this reasoning of the ICJ, in the event of there being no applicable law on the matter, a gap, there is automatic application of the rule that a state is free to act, which, as in the Lotus case, has the effect of closing the gap in the law as an *a priori* condition; thus presenting the international legal system as a closed normative order.

A court or tribunal’s reliance on the utilisation of a ‘residual negative principle’ has an important problematic effect however: any absence of a legal prohibition under this principle constitutes the presence of a legal permission as it equates “legal neutrality to legal permission.”²¹ Taking the view that where, as a matter of fact, there is no law that has been consented to, (i.e. a prohibition) means that a rule of law exists (i.e. a permission to act freely) as a means of addressing a lacuna in the law in turn raises problems of the logical coherence of the law. What one is being required to accept is that if there is no law on a given issue as a matter of fact then that ‘fact’ gives rise automatically to a rule of law in itself. Under this ‘residual negative principle’ the closed nature of the international legal system “does not only exist *de facto* but *de jure*”.²² As Kammerhofer correctly points out such a view of the law is

²⁰ *Nicaragua*, *supra* note 19, para. 269.

²¹ Stone, *supra* note 4, p. 136.

²² Weil, *supra* note 10, p. 112.

based upon a ‘logically bivalent view of normative modality’²³ and fails to take account for the fact that the law does not concern itself with all forms of behaviour. By way of illustration Kammerhofer refers to the act of sharpening a pencil and points out that the law will most likely have nothing to say on this act, going on to ask: ‘should we now assume, in order to close the legal system, that therefore this behaviour is somehow permitted by law?’²⁴

In his dissenting judgment in the *Lotus case*, Judge Nyholm was similarly critical of the reasoning of the PCIJ, saying:

“The reasoning of the judgment appears to be that, failing a rule of positive law, the relations between States in the matter under consideration are governed by an absolute freedom... But that is a confusion of ideas. In considering the existing situation of fact, a distinction should be drawn between that which is merely an international situation of *fact* and that which constitutes a rule of international *law*. The latter can only be created by special process and cannot be deduced from a situation which is merely one of fact.”²⁵

The utilisation of a ‘residual negative principle’ in this way to complete the system does a disservice to the development of international law as a coherent body of law. Dealing with gaps in this way may secure the *formal* completeness of international legal system but at the same time it diverts attention away from the Court’s important role of ensuring the *material*

²³ J. Kammerhofer, ‘Gaps, The Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument Between Theory and Practice’, 80 *British Yearbook of International Law* (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1536582 p. 4

²⁴ *Ibid.*

²⁵ *Lotus*, *supra* note 17, Dissenting Opinion M Nyholm, p. 60.

completeness of the law.²⁶ This is because where a gap in the law exists, the utilisation of a ‘residual negative principle’ does nothing to remedy the material gap in the law and thereby contributes nothing to the development of the law. It could be said that such an approach merely entrenches the gap and arguably obstructs the development of law. Moreover, according to Lauterpacht, the utilisation of such an approach by the Court demonstrates an ever-present danger in administration of justice in general and in international law in particular in that it reduces the role of judges to an automatic function that could “defeat the very end of law.”²⁷

III. Conceiving the completeness of international law as an *a priori* assumption

An alternative approach to the existence of gaps in international law is the recognition that international law is *de facto* incomplete in a material sense but the international legal system provides the means to close any gap, thereby making the international legal system complete; but not in the ‘closed’ sense as discussed earlier.

What is meant by ‘complete’ here is that international law does not have a substantive answer to every question posed but where there is no specific legal rule the international legal system has the techniques and mechanisms for finding the appropriate answer.²⁸ As Weil notes, “Once a lacunae is identified, it is neutralized *ipso facto*. This neutralization, however, does not occur automatically in the international legal system; rather, it occurs only when the lacuna comes to

²⁶ H. Lauterpacht, *The Function of Law in the International Community* (2011) p. 94.

²⁷ *Ibid.* p. 93.

²⁸ K. Kulovesi, ‘Legality or Otherwise? Nuclear Weapons and the Strategy of Non Liquefaction’, 10 *Finnish Yearbook of International Law* (1999) p. 63; According to Jennings what is meant by complete is “not that there is always a clear and specific rule readily applicable to every international situation, but that every international situation is capable of being determined *as a matter of law*, either by the application of specific legal rules where they already exist, or by the application of legal rules derived by the use of known legal techniques from other legal rules or principles.” R. Jennings and A. Watts (eds.), *Oppenheim’s International Law*, 9th ed., Vol. 1 (1996) p. 12

light judicially. Pending judicial determination, the deficiency persists.”²⁹ Therefore the international legal system is seen as ‘self-curative’³⁰ in that where gaps in the law exist, the international legal system through judicial activity has the capacity to fill those gaps.

This capacity for self-curing a gap in the law was the basis for Sir Hersch Lauterpacht’s view of the completeness of the international legal system. Lauterpacht distanced himself from the Kelsenite positivist view of the *formal* completeness of international law as exemplified by the utilisation of a ‘residual negative principle’ to complete the law, as in *Lotus* and *Kosovo*. In his important work, ‘The Function of Law in the International Community’, Lauterpacht argues that the international legal system is ‘materially’ complete because all gaps are eradicated by judicial creativity. For Lauterpacht the issue of gaps in the law is bound up with the issue of the judicial function and in particular the question of judicial activity. According to Lauterpacht where there are no specific rules the question before the Court would still be remediable by the legal system. This will be by more abstract rules and judicial creativity. According to Lauterpacht there are general principles of law that are recognised by civilised nations that represent an “inexhaustible storehouse of potential law”³¹ that will enable a court to address any circumstance in which a gap in the substantive law is perceived and thereby enabling the artifice of completeness to be maintained. In particular Lauterpacht pointed to Article 38(1)(c) of the Statute of the International Court of Justice, ‘General principles of law recognised by civilised nations’ as an important device for remedying any gap within international law. In fact Lauterpacht went as far as to argue that “the general principles of law recognised by civilised nations” in Article 38(1) (c) incorporated the principle of the completeness of the

²⁹ Weil, *supra* note 10, p. 112

³⁰ *Ibid.* p. 110.

³¹ Stone, *supra* note 4, p. 133.

international legal system as a general principle and “definitely removed the last vestige of the possibility of gaps.”³²

Yet, where the Court is asked to fill a gap by resort to such general principles, how creative should a Court be in its interpretation and application of general principles when filling a gap? In a domestic common law context this issue has given rise to some heated debate. On the one hand it is accepted that a judge would be required to exercise discretion and in many senses to take on the role of law-creation, albeit in a limited capacity. The view of the legal system filling gaps by the judge exercising ‘limited law-creating discretion’ has been examined by H.L.A. Hart.³³ Hart suggests that the law is inevitably incomplete and goes on to argue that a central feature of the judicial function is the exercising of discretion to create law where a gap in the law exists.³⁴ But the exercising of law-creating powers by judges; that is the capacity of judges to exercise their ‘discretion’ to fill gaps in the law is limited and must be limited. So according to Hart, for example, where the judge exercises a law-creating function to fill a gap in the law the exercising of this discretion is limited to the extent of dealing with the gap in the context of the instant case and not for the introduction of widespread reform. That function is the preserve of a legislature.³⁵ On the other hand Dworkin would argue that judges do not exercise discretion in the sense characterised by Hart because judges regard themselves as bound by law even though no rules are clearly applicable.³⁶ For Dworkin what we understand as the legal

³² Lauterpacht, *supra* note 26, p. 75.

³³ H.L.A. Hart, *The Concept of Law* (1997) p. 272. Although considering the domestic legal system in the main Hart’s observations are valid for the international legal system.

³⁴ *Ibid.*

³⁵ Hart, *supra* note 33, p. 272; Hart goes on to say “But he [the judge] must not do this arbitrarily: that is he must always have some general reasons justifying his decision and he must act as a conscientious legislator would by deciding according to his own beliefs and values. But if he satisfies these conditions he is entitled to follow standards or reasons for decision which are not dictated by the law and may differ from those followed by other judges faced with similar hard cases.”

³⁶ R. Dworkin, *Taking Rights Seriously* (1978), p. 25

system consists of legal rules and legal principles. Where there is no applicable law (legal rule), he would argue, judges still apply law through the application of legal principles (as distinct from legal rules) which constrain their judicial decision-making and thereby the discretion claimed by Hart.³⁷ Dworkin makes note however that there are a number of ways in which judges exercise ‘weak’ discretion. For example Dworkin concedes that judges must exercise discretion in the sense that they are required to use their judgment in reasoning from legal principles to legal conclusions. Moreover, in some instances they have discretion in the final judgment of a case. But beyond this, Dworkin is of the view that judges are bound by law even where there is an absence of law.

In the international legal system different curative approaches can be and have been utilised by various international tribunals in order to deal with perceived gaps in the law. One approach could be by means of the tools of authoritative interpretation and decision-making on the subject by the Court and this can be done, according to Rosalyn Higgins, by “use of analogy, by reference to context, by analysis of the alternative consequences.”³⁸ For many this will be familiar and considered the normal process of the development of the law by the inherent judicial function of the Court.³⁹ As Gerald Fitzmaurice observed: “It is axiomatic that courts of law must not legislate: nor do they overtly purport to do so. Yet it is equally a truism that a constant process of development of the law goes on through the courts, a process which involves a considerable element of innovation ... As is well known, they adapt existing principles to meet new facts or situations. If none serves, they in effect propound new ones by appealing to some antecedent or more fundamental concept, or by invoking doctrines in the

³⁷ *Ibid.* pp. 31-4

³⁸ *Ibid.* p. 10; see also Lauterpacht, *supra* note 26, p. 119.

³⁹ See Weil *supra* note 10, p. 110.

light of which an essentially innovatory process can be carried out against a background of received legal precept.”⁴⁰

As noted previously a cornerstone to the assertion of the completeness of the international legal system as promoted by Lauterpacht is Article 38(1)(c), which Lauterpacht asserts provides a means through which gaps in the law can be remedied or cured. From Lauterpacht’s view of Article 38(1)(c) therefore there can be no gaps in the international legal system because it is at least arguable, certainly from Dworkin’s perspective, that there will always be a principle of law which is capable of interpretation and application to the case in hand. This is particularly so given the possibility of recourse to “general principles of law recognised by civilised nations” as part of the body of international law. For example, in the *Barcelona Traction* case,⁴¹ when faced with an apparent gap in the law, the Court immediately filled it with recourse to a general principle of domestic law regarding the concept of a limited company.⁴² Moreover, in the *North Sea Continental Shelf* cases,⁴³ which is often cited as an example of the resort equity by the ICJ when faced with a gap in the law, the Court rested the criteria applicable to continental shelf delimitations directly upon equity rather than upon the extension of existing rules and principles of law. In this respect equity was used, not so much to fill a gap in the law, but equity was instrumental to the determination of the appropriate application of the existing law without which a gap could have appeared.⁴⁴ In the case the Court stated explicitly that it

⁴⁰ G. Fitzmaurice, ‘Judicial Innovation - Its Uses and its Perils’ in *Cambridge Essays in International Law* (1965) pp. 24-25.

⁴¹ *Barcelona Traction, Light and Power Company Limited*, Judgment, 1970 I.C.J., p. 33.

⁴² See Weil, *supra* note 14, p. 111.

⁴³ *North Sea Continental Shelf Judgment*, 1969 I.C.J. 3, at para. 88 [*Hereinafter North Sea Case*]; See also *South West Africa*, Second Phase, Judgment, 1966 I.C.J. 6, at para. 88, in which the Court referred to the application of general principles of law in a negative context.

⁴⁴ See Lowe, *supra* note 51, p. 61.

was not “applying equity simply as a matter of abstract justice, but applying a rule of law which itself requires the application of equitable principles.”⁴⁵

Arguably, to suggest today that the Court has a law-creating function is not a matter of particular controversy. The judicial function of the Court is and should be something more than the “automatic application of existing rules to particular situations.”⁴⁶ This is all the more important if the ‘existing rules’ are contrived from the application of a ‘residual negative principle’. So where a gap in the law exists, the interpretative function of judges becomes important in addressing the inadequacies of the international legal system.⁴⁷ Seeing the judicial function as including a law-creating function means that a gap in the law should not be assessed within the narrow confines of whether there is an existing positive rule to be applied or not. Rather than seeing applicable law in terms of the existence of a positive rule, the applicable law, and thereby the existence of a gap, should be seen within a broader context that involves consideration of “the entirety of legal and social relationships within the Community” and “what the legislator would have intended if he could have foreseen the changes occurring in the life of the community.”⁴⁸ Seen this way, law can be product of authoritative decision-making by the Court. Moreover it is a basis for asserting the view of the completeness of the international legal system. This is because where a positive rule does not cover the matter under consideration by the Court i.e. there is a gap, viewing the international legal system and the judicial function in this way enables the Court to fill the gap by using its interpretative discretion in authoritative decision-making.

⁴⁵ *North Sea Case*, *supra* note 53, para 85.

⁴⁶ R. Higgins, *Themes & Theories: Selected Essays, Speeches, and Writings in International Law Vol. 1* (2009) p. 28

⁴⁷ Higgins, *supra* note 46, p. 28 ; See also Lauterpacht, *supra* note 26, p. 78

⁴⁸ Lauterpacht, *supra* note 26, p. 88

According to Higgins, in contemporary terms such a view would be described as a policy-orientated approach to international law: “It urges that, in these ‘unclear’ areas at least, attention be paid to the entirety of relationships in the community; it emphasized development; and it refutes the charge that such an approach is arbitrary.”⁴⁹ If one sees the international legal system in these terms then, as Higgins would assert: “There are no events which are inherently beyond authoritative decision-making”. Where a gap exists the Court has the power to decide a matter before them “on the basis of either explicit rules and principles or on the basis of unarticulated principles, general aims and values underlying the legal system.”⁵⁰ Thereby the international legal system can be said to be ‘complete’ without being ‘closed’ and resort to relying on the reductive reasoning of a ‘residual negative principle’.

IV. Conceiving the neutrality of international law

In his Separate Declaration to the *Kosovo* Advisory Opinion Judge Bruno Simma presented a number of criticisms of the majority judgment. The full range of these criticisms will not be addressed here.⁵¹ Of particular interest to this article, however, is Judge Simma’s identification of what he sees as a “wider conceptual problem”⁵² with the approach of the Court. In his view the Court could have considered the scope of the question put to it from an approach which did not, in a formalistic fashion, equate the absence of a prohibition with the existence of a permissive rule.⁵³ He felt the Court was provided with the opportunity to move away from the ‘binary’ approach to the analysis of international law favoured by advocates of the ‘*Lotus*

⁴⁹ Higgins, *supra* note 46, p. 30

⁵⁰ I.F. Dekker & W.G. Werner, ‘The Completeness of International Law and Hamlet’s Dilemma, Non Liquet, The Nuclear Weapons Case and Legal Theory’, (1999) 69 *Nordic Journal of International Law* p. 230.

⁵¹ See generally *Kosovo supra* note 1, Separate Declaration Judge Simma.

⁵² *Ibid*, para. 8.

⁵³ See *Kosovo supra* note 1, Separate Declaration Judge Simma, para. 3;

principle’ and, in particular, it had the opportunity to explore ‘whether international law can be deliberately neutral or silent on a certain issue’⁵⁴ and thereby incomplete as a system of law. Rather than limiting “itself merely to an exercise in mechanical jurisprudence”, Judge Simma was advocating a more creative approach by the Court to the exercise of its interpretive function when faced with a gap in the law;⁵⁵ one that includes not only stating the law “as it is, with its prescriptive, prohibitive, or permissive rules”⁵⁶ but also includes recognising its gaps and incompleteness.

However, the assertion of the possibility of international law’s neutrality raises the question of how one conceives of this idea. Notably, beyond claiming the Court should have considered the matter, Judge Simma provided, at best, very limited guidance about how one can conceive of the concept of ‘legally neutral’ behaviour. For example in paragraph 3 of his separate declaration he asserts that the Court could have ‘considered the possibility that international law can be *neutral*... on the international lawfulness of certain acts’ [Emphasis added] but he provides no explanation of what this means beyond declaring in paragraph 9 that ‘[t]he neutrality of international law on a certain point simply suggests that there are areas where international law has not yet come to regulate, or indeed, will never come to regulate.’⁵⁷ For instance, some explanation of what he meant by ‘neutral’ and some explanation of the presumptions about the structure of the international legal system to sustain the possibility of international law’s neutrality he was making, would have been helpful. A potentially helpful guide to understanding Judge Simma’s claim about the possibility of international law being

⁵⁴ The question of whether international law might be silent on the issue of Kosovo’s declaration of independence was discussed in some detail in the Written Statement of Germany submitted to the Court. See *Kosovo supra* note , Statement of the Federal Republic of Germany, April 2009, 27-32;

⁵⁵ *Kosovo supra* note 1, Separate Declaration Judge Simma, para. 10.

⁵⁶ Weil, *supra* note 10, p. 117.

⁵⁷ See *Kosovo supra* note 1, Separate Declaration Judge Simma, paras. 3 & 9

neutral on a matter is the work of Ilmar Tammelo, on the logical openness of legal orders.⁵⁸ He for example, defines the concept of ‘legally neutral’ to mean:

‘Where a legal order does not contain any norm specifying how to qualify legally the behaviour about which the law in question is silent, obscure, or self-contradictory, one can say that it has left such matters completely at large. It has neither “willed” to regulate these matters in a certain way nor has it “willed not to will” their regulation.’⁵⁹

As already discussed, according to Judge Simma the resort of the Court to the use of a ‘residual negative principle’ and thereby the conception of international law as a logically closed system of law was a mistake. It would seem that in his view, because international law on the question presented to the Court was silent on the matter, i.e. there was no norm that prohibited the behaviour, nor obligated behaviour, nor permitted behaviour, then international law is neutral through its silence because, in line with Tammelo, it has ‘neither “willed” to regulate these matters in a certain way nor has it “willed not to will” their regulation.’

An important factor to understanding of the idea of ‘legally neutral’ behaviour; and key to understanding the approach advocated by Judge Simma, is the recognition of the international legal system as a logically open or incomplete normative system; one in which there can be an absence of law in the form of gaps.⁶⁰ Whereas ‘legally neutral’ behaviour is a corollary of this open/incomplete condition of the international legal system,⁶¹ it is excluded in a

⁵⁸ I. Tammelo *supra* note 5, pp. 187-203

⁵⁹ I. Tammelo *supra* note 5, p. 194; Kammerhofer *supra* note 23, p. 5

⁶⁰ I. Tammelo *supra* note 5, p. 192; see generally Kammerhofer for recent and detailed analysis of gaps in international law, Kammerhofer states for example that legally neutral behaviour can only exist in an open system. Kammerhofer *supra* note 23

⁶¹ Kammerhofer states for example that legally neutral behaviour can only exist in an open system. Kammerhofer *supra* note 23, p. 5

logically/formally closed system. This is because in a logically/formally closed system behaviour is either prohibited or permitted, meaning that in the apparent absence of law the ‘residual negative principle’ is applied that forecloses any gap; meaning there is no absence of law.⁶²

So, is it conceivable that the international legal system can be logically open/incomplete and is ‘legally neutral’ behaviour possible, as suggested by Judge Simma? According to Tammelo, clearly both of these possibilities are conceivable. He states, for example, that ‘[t]here appears to be no *a priori* reason why a legal order would not be a logically open normative system.’⁶³ Whilst he acknowledges that the idea that all legal systems are logically closed or complete is one that is widely held,⁶⁴ he goes on to argue that there is no evidence of a norm of general international law that directly establishes its logical completeness.⁶⁵ A view clearly shared by Judge Simma.

Moreover with respect to the possibility of international law being neutral on a matter, in applying the principles of modal logic, Tammelo explains that in the ‘legal universe’, there exists a number of deontic modes which he describes as ‘deontic circumstances of juristic concern’,⁶⁶ ranging from behaviour that is ‘obligatory’, ‘prohibitory’, ‘licensory’, ‘permissive’, ‘allowable’ and includes, ‘legally neutral’ behaviour.⁶⁷ In his analysis of the question the possibility of legally neutral behaviour Kammerhofer clarifies that whereas “[i]n a closed

⁶² I. Tammelo *supra* note 5, p. 200; Kammerhofer *supra* note 23, p. 5

⁶³ I. Tammelo *supra* note 5, p. 200

⁶⁴ *Ibid.*, p. 188

⁶⁵ *Ibid.*, p. 201

⁶⁶ Tammelo explains that deontic modes are ‘technical terms used by logicians for signifying notions such as “obligatory”, “forbidden”, and “permitted” by which various kinds of behaviour in relation to normative orders are differentiated and logically apprehended.’ I. Tammelo *supra* note 5, p. 195

⁶⁷ I. Tammelo *supra* note 5, p. 195 ; see also Kammerhofer *supra* note 23, p. 5

system the relationship between ‘obligatory’ and... [‘licensory’], on the one hand, and ‘prohibitory’ and ‘permissive’, on the other is a dichotomic exclusion”, i.e. behaviour is either “prohibited or permitted, but cannot be anything else”, which equates to a ‘residual negative principle’.⁶⁸ On the other hand: “In open legal systems... while an obligation to do something and a right not to do something contradict, it is not the case that there must exist either the obligation or the right.”⁶⁹ Julius Stone put it thus: ‘There may be conduct which does not fall within any of the modalities which characterise a closed system, that is, which may be neither prohibited by a norm, nor made obligatory by a norm, nor permitted by a norm. There may, be in short, the category of conduct...which is neither prohibited, not required nor permitted by the norms. There may be conduct, that is, about which the norms say nothing at all.’⁷⁰ It would seem that it was in this sense that Judge Simma was envisaging the possibility of international law being neutral on a matter when he suggested that there are areas where international law has not yet come to regulate, or indeed, will never come to regulate.⁷¹ If in an open legal order international law is indifferent to the behaviour in question then it is possible to say that international law neither ‘willed’ nor “willed not to will” regulate matters and is thereby neutral in the sense posited by Tammelo.

However, how will recognising that international law is legally neutral on a matter affect international law’s coherence? Will declaring that the law is silent or neutral on a matter make international law incoherent?⁷² In judge Simma’s view recognising international laws neutrality would give rise to ‘no wider conceptual problem relating to the coherence of the

⁶⁸ Kammerhofer *supra* note 23, p. 5

⁶⁹ *Ibid.*

⁷⁰ J. Stone, “Non-Liquet and the Judicial function”, in: Ch. Perelman (ed.), *La problem des lancunes en droit* (Presses Universitaires, Bruxelles, 1968), p. 309 taken from Dekker & Werner, *supra* note 50, p. 236 at footnote 40

⁷¹ See *Kosovo* *supra* note 1, Separate Declaration Judge Simma, para. 9

⁷² *Ibid.*

international legal order.’⁷³ It could be said that by declaring that the law is silent or neutral on a matter undermines law’s validity. On the other hand one could argue that declaring the law is silent or neutral on a matter does not in itself make international law incoherent; rather as Weil suggests for instance, ‘[a]s long as no clear rule has emerged from the norm-creating process, there is simply no legal truth...’.⁷⁴ By declaring the law neutral or silent on a matter merely acknowledges the state that international law is in at the given time. But, whilst the declaration of international law’s neutrality on a matter may be conceptually coherent, in practical terms it is open to question whether there is actually any difference between a declaration of law’s neutrality and the resort to a residual negative principle – which Judge Simma clearly rejects as a proposition. If international law is neutral towards certain behaviour then it is *de facto* allowing it to continue. For those concerned, how does this differ from the outcome of applying a residual negative principle? One could argue that a declaration that the law in its current state is neutral or silent on a matter or the law is unclear and thus the Court is unable to decide on a matter is a legitimate response that can be seen as constructive to the future development of international law in a way that the resort to denying the existence of a gap in the law as an *a priori* condition is not.

VII. Conclusion

The purpose of this article has been two-fold. The first part sought to evaluate critically the idea of the ‘closed’ nature of the international legal system on the one hand and the idea of the ‘completeness’ of the international legal system on the other hand. The second part has been to examine Judge Simma’s view of ‘the possibility that international law can be neutral... on

⁷³ *Ibid.*

⁷⁴ P. Weil, *Le droit international en quête de son identité: cours general de droit international public*, 237 RECUEIL DES COURS 207 (1992 VI)

the international lawfulness of certain acts.’⁷⁵ This is not merely an academic issue. With the ever increasing resort by States to the adjudication of disputes arising from new developments in contemporary relations inevitably there will be areas of conflict and dispute for which international law will have no ready answer. For example, disputes arising from territorial claims, maritime disputes and disputes over resources. Inevitably there will be new situations in respect of which the law is unclear or to which it does not yet extend, meaning gaps in international law do and will arise.

This article has sought to evaluate three different approaches to the understanding of international law’s normative order. On the one hand is the tired, anachronistic view of international law as a closed normative order premised on the archly positivist approach that involves resort to a ‘residual negative principle’ whereby what is not expressly prohibited in international law is permitted. Thereby closing out the possibility of gaps in international law existing. As discussed this view of international law, although raising its head in the recent Kosovo Advisory Opinion, is to be avoided. This is because employing such reductive reasoning is argued to be both limiting to the development of international law and a reneging of the court’s essential interpretive function, which is a fundamental aspect of the exercise of its judicial function. The resort to a ‘residual negative principle’ in response to an absence of law leaves the law undeveloped as the gap is closed by a general proposition that effectively denies the existence of the gap. The effect of this is to negate the law’s development because it leaves the material gap unaddressed. Employing such reductive reasoning is argued to be both limiting to the development of international law and a reneging of the court’s essential interpretive role, which is a fundamental aspect of the exercise of its judicial function.

⁷⁵ See *Kosovo supra* note 1, Separate Declaration Judge Simma, para. 3

However, that international law contains material gaps is well recognised. Courts and tribunals in both domestic legal systems and in the international legal system are constantly being presented with new situations in respect of which the law is unclear or to which it does not yet extend. In this sense therefore international law could be described as incomplete in nature. As we have discussed, however, the fact material gaps exist in the law does not negate the possibility of the international legal system being a ‘complete’ normative order. This is because the international system has the capacity to fill such gaps by employing recognisable and accepted legal devices and reasoning, such as general principles of law and reasoning by analogy; thereby making the international legal system ‘complete’ *ex post facto*.⁷⁶ In contrast to the ‘closed’ system which negates the development of the law and leaves the material gap unaddressed, the process of a court or tribunal filling a gap in such a manner is what most would understand as the court or tribunal exercising its judicial function.

In the final part of this article we considered Judge Simma’s view that international law can be neutral on a matter, thereby giving rise to a gap. The key understanding here is the idea of the international system being a logically ‘open’ or ‘incomplete’ system of law whereby gaps exist. Here we considered the question of how one can conceive of the neutrality of international law, assisted by the insights gained through the application of the principles of modal logic. It was concluded that it is possible to conceive of international law’s neutrality on a matter and such an idea would not give rise to international law’s incoherence. On the contrary, in contrast to adopting a ‘closed’ view of the international legal system, recognising international law’s neutrality can be constructive to its future development in a way that applying a residual negative principle is not. That said, there is some difficulty in seeing the practical difference between Judge Simma’s view of international law being neutral on a matter and the resort to a

⁷⁶ See Weil, *supra* note 10, p. 110

residual negative principle. As already noted, if international law is 'neutral' towards certain behaviour then it is, *de facto*, allowing it to continue, arguably, in the same way as applying a residual negative principle as discussed.